United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

75-1114

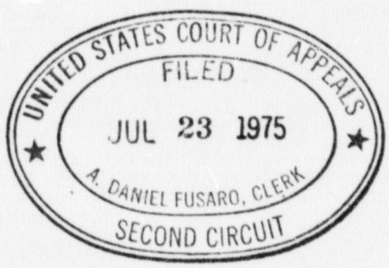
To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- GARY SINGLETON, WILLIAM M. KIRBY, and WILLIAM ELMORE, Appellants.	Docket No. 75-1114

BRIEF FOR APPELLANT
WILLIAM ELMORE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLANT WILLIAM ELMORE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether appellant Elmore's conviction for possession of stolen mail (18 U.S.C. §§1708, 2) must be reversed and dismissed for failure to prove beyond a reasonable doubt either possession or aiding and abetting.

2. Whether it was plain error to instruct the jurors that there was no difference between a finding of guilt on the constructive possession theory and the theory of aider and abetter.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Bartels, J.) on March 14, 1975, upon appellant William Elmore's conviction (74 Cr. 712*) after a trial before a jury of knowing possession of stolen mail, in violation of 18 U.S.C. §1708. Elmore was sentenced as a youthful offender to an indefinite six-year term of imprisonment pursuant to 18 U.S.C. §5010(b) of the Youth Corrections Act, and is currently serving that sentence.

The Federal Defender Services Unit of The Legal Aid Society (which represented Elmore at trial) was continued by this Court as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

George Attmore, a letter carrier for the United States Postal Service assigned to a residential section of Jamaica, Queens, testified that while he was making door-to-door deliveries of mail on June 17, 1974, approximately 500 pieces

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*The indictment is annexed as "B" to appellant's separate appendix. Indictment 74 Cr. 712 is a superseding indictment, the original (74 Cr. 449) having charged only the co-defendant Singleton.

of United States mail were unlawfully removed from his locked mail jeep which he had left parked on the street while making his rounds (128-131*).

Attmore stated that in the vicinity of the jeep prior to his discovery of the theft he observed a green 1968 or 1969 Ford Falcon with a black vinyl top. At the time he first observed this vehicle, Attmore stated, his mail jeep was parked at the curb at 146th Street and 130th (96). The Falcon was parked parallel to the jeep facing in the same direction and so close to it that it was impossible for a person to walk between the two vehicles (105). Attmore observed that inside the Falcon were two individuals whom he identified at trial as the co-defendants Singleton and Kirby (110-111). Singleton was the driver of the car; Kirby was seated in the right front passenger seat. A third person was standing outside the car at the driver's window, talking to the two men inside the car (105, 113). Because the third person's back was at all times turned to him, Attmore was unable to identify appellant Elmore as this individual (112-114), although he did describe this person as approximately 5'10" tall, black, and weighing 175 to 180 pounds, wearing dark slacks, a multicolored shirt, and a dark, peaked cap (113, 274), which description fit the appearance of appellant Elmore at the time

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*Numerals in parentheses refer to pages of the transcript of the trial.

of his arrest (351-355).*

After noticing the Falcon, Attmore proceeded with his mail route (107), returning to the jeep approximately four minutes later for another bundle of mail (114). At this time he saw the Falcon still parked next to his jeep in the same position he had noted earlier and the same three persons present. As he approached the jeep, however, the Falcon slowly began to move (115), with the man who had been standing outside the car walking alongside the car and leaning his head inside the driver's window as the car slowly moved away. The Falcon proceeded down the street, turned around, and parked on the opposite side of the street (115-120). At this point Attmore noted the license number of the car -- 336 QF 2 -- on a slip of paper. He then opened the jeep and removed another bundle of mail (115, 116, 120). Before leaving the jeep Attmore locked the doors with a key, making certain it was secure (120). Upon his return to the jeep some twelve minutes later at approximately 12:35 or 12:40 p.m., he discovered that the rear doors had been jimmied open and a bundle, which Attmore estimated contained approximately 500 pieces of mail, had been removed. The Falcon was no longer in sight (125-131).

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*In his summation counsel for appellant Elmore below did not dispute that Elmore was the third person standing outside the Falcon prior to the theft of the mail from the jeep. He argued rather that there was no proof that Elmore ever possessed or aided and abetted in the possession of the stolen mail (470-474).

Attmore stated that he immediately went to a neighborhood house and reported the theft by telephone to the office of the United States Postal Inspectors, providing them with a description and license number of the Ford Falcon he had observed in the vicinity immediately prior to the theft (133, 135, 136).

United States Postal Inspectors were dispatched in an unmarked car to search for the Falcon in the Jamaica area. Approximately an hour later, the inspectors observed the car in the area of Jamaica Station (285-290).

Philip Rinzulli, one of the Postal Inspectors who noted the Falcon from the patrol car, testified that the government vehicle stopped in front of the Falcon which had already come to a stop at the curb, and that he and Inspector Cole immediately got out of their car and approached the passenger side of the Falcon, identified themselves, and directed that the occupants of the car get out (292-293). The co-defendant Kirby, who had been seated in the front passenger seat, and appellant Elmore, who had been sitting alone in the back (280-290), immediately complied with this request. Upon getting out of the car they were taken to the sidewalk where they were directed to face the building wall and searched for weapons (294-296). As the inspectors were searching Elmore and Kirby, the co-defendant Singleton, the driver of the Falcon who had failed to get out when directed, drove off in the car (298, 301). As he departed he tossed a rolled-up plaid

jacket from the passenger door, which Kirby had left open. The jacket landed on the sidewalk (302-304, 378). Rinzulli testified that, after first handcuffing Elmore and Kirby, he retrieved the jacket and found that, rolled up loosely inside it, but not in any of the pockets, was an envelope containing four checks.* Inside one of the pockets of the jacket was a wallet containing identification belonging to appellant Elmore (304-312). Rinzulli stated that he asked Elmore and Kirby whether the jacket belonged to either of them, and both denied ownership (362). Elmore and Kirby were then taken in custody to the Jamaica Post Office for processing (314).

Agent O'Neill pursued the co-defendant Singleton, who had sped away in the Falcon, and took him into custody a short time later after a brief chase (343-344).**

During questioning at the Jamaica Post Office, Elmore acknowledged to Inspector Rinzulli that the jacket thrown from the Falcon was his, explaining he had lied "because he didn't want to get involved." However, Elmore denied knowing

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*The envelope was described as a yellowish-green envelope containing a return address for Chase Manhattan Bank and bearing a June 14, 1974, postmark. The envelope was slit open at the top and contained the four checks named in the indictment. The payees of the checks were identified as addressees on Attmore's route (305-306).

**Agent O'Neill's testimony was similar to that of Rinzulli as to the apprehension of the defendants. However, through O'Neill's testimony the Government introduced a photograph of Elmore which had been taken at the time of his arrest. The photograph -- Government Exhibit #15 -- depicts Elmore wearing a dark peaked cap and a multi-colored shirt (351-355).

anything about the checks which were found in the jacket (320-321).

At trial, Elmore called one witness on his behalf. Agent O'Neill, who had also testified for the Government, testified that he made a check on the New York license plate on the Falcon with the New York State Department of Motor Vehicles which verified that the car was registered to co-defendant Gary Singleton (432)* who was driving.

Motions on behalf of Elmore for a directed verdict of acquittal -- made at the close of the Government's case (389) and renewed after the defense had rested (435) -- on the ground that the Government had failed to establish Elmore's guilt beyond a reasonable doubt were denied.

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*The only other defense witness was co-defendant Kirby, who testified on his own behalf. He stated that he met appellant Elmore at 12:50 that day on the corner of 149th Street and Rockaway Boulevard. He stated that Elmore arrived on foot approximately five minutes later and that, while they were on their way to the bus station, the co-defendant Singleton offered them a ride (408-411). Kirby denied participation in the theft and asserted that he had no knowledge of the checks or the envelope found rolled up in Elmore's coat (412-413). He further stated that after their release on bail he asked Singleton about the stolen mail in the jacket and that Singleton had made no reply (430).

The Charge*

The District Judge sent the case to the jury on alternate theories of guilt, instructing the jurors that one or more of the defendants could be found guilty as a principal or as an aider and abetter (533-535).

Judge Bartels further instructed the jurors that, in considering guilt as a principal, they should consider actual, as well as constructive, possession. The Court's specific instructions were as follows:

> The charge here is knowing possession of stolen checks. That is possession with knowledge that the checks were stolen. The charge that all three of these men were in possession of the stolen checks requires some discrimination.
>
> In the first place, we must think of the kind of possession we are talking about. There are two kinds. There is actual possession and there is such a thing as constructive possession which I will comment on.
>
> In the second place, we must ascertain who had possession -- all three or just one or two of the defendants. Of course, if the possession was not with knowledge that they were stolen that ends the case. In the third place, if only one or two, instead of all three had possession, then did the defendant or defendants who did not have possession aid and abet the defendant or defendants who did have possession? I know this is a little complicated but let us try to make it simple.

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*The complete charge to the jury is annexed as "C" to appellant's separate appendix.

When I am talking about possession or aiding and abetting, I am referring to possession or aiding and abetting with knowledge that the checks were stolen. Knowledge is the key factor in this case.

In the first place, possession may be actual physical possession of the stolen checks or it could be constructive possession. "Constructive possession" means that although a defendant did not actually have in his hands, physical possession of the stolen checks, his relationship with the stolen checks or proximity to them was such that he had dominion and control over the stolen checks, either alone or with others. In other words, the checks could be in the car where all three could or could not have control, although none of them have them in their hands or even on their body. But, they could have dominion and control over them jointly. Under such circumstances, it is said that persons have control over and dominion over such stolen property. Dominon and control are the key words to constructive possession. It is possible for all three defendants to have had either physical or constructive possession jointly of the stolen checks. You may find that constructive possession is present if you find beyond a reasonable doubt that a particular defendant had actual or constructive possession; that is, dominion and control of the checks either alone or jointly with the other defendants.

To sum up, the stolen checks could have been in the joint physical or constructive possession of all three defendants or only two of the defendants or the stolen checks could have been only in the physical or constructive possession of one of the defendants. You will remember that all three were in the car at one time.

(539-541).

The District Judge further charged that, should the jurors find at least one of the defendants guilty as a principal they might also consider whether the other defendants aided and abetted the principal in possessing the checks. The Court's instructions as to this were as follows:

> If you find that the stolen checks were in the joint physical or constructive possession of all three defendants, then you need not consider the question of aiding and abetting, assuming that you find that it was in their joint possession knowing that the checks were stolen. If, however, you find that the possession, physical or constructive, of the stolen checks was jointly held by only two of the defendants or held by only one of the defendants, then you may proceed to ascertain whether the other one or two of the defendants aided or abetted the remaining one or two, as the case may be, in having or obtaining knowing possession of the stolen checks.
>
> Mere presence of a person at the place where the checks were stolen is not sufficient, without more, to charge that person with constructive possession of the stolen checks. There must be some relationship by the defendant or defendants as the case may be, with the stolen checks. I am talking about constructive possession.
>
> If you find that only one of the defendants had knowing illegal possession of the stolen checks, then you may ascertain whether the other one or the other two aided and abetted him in this knowing illegal possession of the stolen checks. I must, therefore, in this connection, instruct you that the mere presence, without more, of any defendant or defendants in the green Falcon car where there may have been illegal possession of the stolen checks, is not sufficient to charge him or them with aiding and abetting this illegal possession. Moreover, mere presence in

> the car and the knowledge by one or more of the defendants that another defendant or defendants was or were guilty of illegal possession of the stolen checks is not sufficient to charge him or them with aiding and abetting. What I am trying to say to you is that presence in the car in which someone has illegal possession of stolen checks is not sufficient even though he knew someone did have in his possession illegally stolen checks. I must also state to you that, if you find that one defendant had knowing illegal possession of the stolen checks and one or two of the other defendants associated himself or themselves with the venture and if they became closely associated with the venture, so that, in fact, they were really participants in the illegal possession of the stolen checks, knowing them to be stolen and seeking by their very actions to make the illegal possession a successful illegal possession, then you may, if such facts are proven beyond a reasonable doubt, find them guilty of aiding and abetting the illegal possession.
>
> (541-544).

After three hours of deliberation without reaching a verdict, the jurors returned with a question: Is there a difference between constructive possession and aiding and abetting (565)? The Judge, taking the question to be an inquiry as to the elements of guilt on each theory, instructed the jurors that there was no difference.

Twenty minutes after this instruction was given, the jury returned with a verdict of guilty as to all three defendants.

ARGUMENT

Point I

APPELLANT'S CONVICTION FOR POSSESSION OF STOLEN MAIL (18 U.S.C. §§ 1708, 2) MUST BE REVERSED AND DISMISSED FOR FAILURE TO PROVE BEYOND A REASONABLE DOUBT EITHER POSSESSION OR AIDING AND ABETTING.

The court below instructed the jurors to consider the case on alternative theories of guilt. The District Judge charged that the defendant could be found guilty if the jury found him to be in actual possession or constructive possession of the checks, or if he aided and abetted the actual or constructive possession by another person. Considering the evidence in the light most favorable to the Government (Glasser v. United States, 315 U.S. 60, 80 (1942), the record reflects that appellant Elmore was present at the scene of the theft at the approximate time the mail was stolen and that he was later present in the car when the checks were recovered. The Government's proof fails to establish, however, that the stolen checks were in the actual possession of appellant Elmore at any time, and similarly fails to show that Elmore had constructive possession of the checks. United States v. Infanti, 474 F.2d 522 (2d Cir. 1973); United States v. Febre, 425 F.2d 107 (2d Cir. 1970); United States v. Jones, 308 F.2d 26, 30 (2d Cir. 1962). Moreover, since mere presence, even when

coupled with the knowledge that a crime is being committed, is not enough to support a finding of guilt as an aider and abetter, United States v. Sisca, 503 F.2d 1337, 1343 (2d Cir. 1974); United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974); United States v. Terrell, 474 F.2d 872, 875 (2d Cir. 1973); United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963); United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962), the verdict may not stand on that theory either. Accordingly, the indictment must be dismissed for failure to prove beyond a reasonable doubt the essential element of the crimes charged. United States v. Johnson, 513 F.2d 819 (2d Cir. 1975); United States v. Steward, 451 F.2d 1203 (2d Cir. 1971); United States v. Kearse, 444 F.2d 62 (2d Cir. 1971).

Alternatively, should this Court find that the evidence was sufficient as to only one of the theories presented, the case must be reversed and remanded for a new trial since it is impossible to determine on which theory the jury rested its verdict. United States v. Reid, slip opinion 3073, 3095-3096 (2d Cir., April 24, 1975), and cases cited therein.

A. There was insufficient evidence to support a jury finding that appellant Elmore was in actual or constructive possession of the stolen mail.

The Government's proof related to two distinct series of events on June 17: the conduct of the defendants at the place the mail was stolen at approximately 12:40 p.m. that day, and the conduct of the defendants an hour later at the time and place of arrest.*

It is beyond dispute that the Government failed to establish that appellant Elmore had actual possession of the checks at the time of the theft or any time thereafter. Thus, in order to sustain a finding of guilt on the constructive possession theory, the evidence must show that appellant had "dominion and control" (United States v. Infanti, supra, 474 F.2d 522; United States v. Steward, supra, 451 F.2d at 1207; United States v. Kearse, supra, 444 F.2d at 64; United States v. Jones, supra, 308 F.2d at 30) over the stolen checks. There is no showing here, however, of the requisite indicia of ownership and control to establish that Elmore had constructive possession over the items of mail. United States

*The defendants here were charged not with the theft of mail, but with unlawful possession of stolen mail.

v. Infanti, supra, 474 F.2d at 526; United States v. Febre, supra, 425 F.2d at 111.*

The Government's proof established that the stolen mail was inside the car in which Elmore was merely a passenger. That car, according to the undisputed evidence, was under the exclusive dominion and control of its registered owner, the co-defendant Singleton, who was driving at all relevant times. While the Government's case is sufficient to establish the constructive possession of the stolen mail by Singleton, this evidence is insufficient to establish Elmore's possession.

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*In Infanti, the Court of Appeals held that the defendant Kurtz was not in constructive possession of stock despite his presence in the hotel room during negotiations for the transfer of the stock:

> There was no evidence that Kurtz could set the price for the securities, that he had the final say as to their means of transfer or that he was able to assure their delivery. Proof of at least these indicia of dominion and control is necessary before finding constructive possession can be made.
>
> Id., 474 F.2d at 526.

In Febre, which involved the question of whether or not the defendant constructively possessed the drugs passed in a sale, the Court observed that the following would be indicia of control and dominion:

> [T]hat a given appellant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery may well be sufficient to charge that appellant with constructive possession of narcotics.
>
> Id., 425 F.2d at 111.

Arrelanes v. United States, 302 F.2d 603 (9th Cir. 1962).*

That Singleton had exclusive dominion and control over the stolen mail is further reflected by his conduct at the time of arrest. Unlike Elmore and the co-defendant Kirby, both passengers in the car who got out as directed, Singleton attempted to flee from the scene and, in so doing, threw Elmore's jacket with the stolen money wrapped loosely inside from the car in an attempt to transfer suspicion of guilt away from himself and onto Elmore. Singleton's conduct reflects a consciousness of guilt. United States v. Heitner, 149 F.2d 105, 107 (2d Cir. 1945) (Hand, J.); United States v. Ayala, 307 F.2d 574 (2d Cir. 1962); Wigmore, EVIDENCE, §273 (3d ed. 1940); see also United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972); United States v. Palmieri, 456 F. 2d 9 (2d Cir.), cert. denied, 406 U.S. 945 (1972). Any contention that because the checks were discovered in appellant Elmore's jacket he must have possessed them must fall of its own weight. There is no proof that the checks were in Elmore's jacket when Elmore was in the car. At the time Singleton threw the jacket from the car, Elmore was, for all practical purposes, already in Federal custody. Thus, the record conclusively establishes that the only person shown to have had

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*In Arrellanes, 40 pounds of marijuana were found in the rear seat of a car in which the husband/driver and wife/passenger were present. The contraband was held to be in the possession of the driver only, since he had exclusive control and dominion over the car. As to the wife, the evidence of possession was held to be insufficient.

possession of the checks in the jacket was Singleton, who remained in the car after Elmore and Kirby got out.

While the Government asserts that Elmore's false denial of ownership of the jacket gives rise to an inference of knowledge, this proof does not cure the defect in the Government's case caused by the failure to establish the element of possession. Moreover, as this Court has noted in a similar context in other cases, it was only natural that, under the circumstances, Elmore would be reluctant to admit any kind of involvement. United States v. Johnson, supra, 513 F.2d 819; see also United States v. Kearse, supra, 444 F.2d at 64.

Since the Government's case boils down to the fact that Elmore was merely present at the time of the wrongful taking and at the time the checks were found, guilt premised on the possession theory cannot stand:

> ... [M]ere proximity to the drug, mere presence on the property where it is located, or mere association without more with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession.
>
> Arrelanes v. United States, supra, 302 F.2d at 606, quoting from Evans v. United States, 257 F.2d 121, 126 (9th Cir.), cert. denied, 358 U.S. 866 (1958).

B. The Government's proof is insufficient to sustain a finding of guilt on the aiding and abetting theory.

Further, the Government was not able to establish Elmore's guilt as an aider and abetter. The law is clear:

> [I]n order to be an aider and abetter the appellant must associate himself with the venture in some fashion, "participate in it as something that he wishes to bring about," or "seek by his action to make it succeed." United States v. Peoni, 100 F. 2d 401, 402 (2d Cir. 1938); see also Nye and Nissen Corp. v. United States, 336 U.S. 613, 619 (1949); United States v. Terrell, 474 F.2d 872, 875 (2d Cir. 1972).
>
> United States v. Johnson, supra, 513 F.2d at 823

While it was the Government's contention below that appellant Elmore was the lookout at the time of the theft, this argument is not supported by the record. First, Attmore, the letter carrier, was unable to identify Elmore as the person standing outside the car at the place the theft occurred. Second, assuming arguendo that Elmore was that person, his acts were not those of a lookout: the record reflects that he was at all times standing at the driver's side of the car with his head facing the car, talking with the occupants inside the car. Absent evidence of "purposeful behavior, mere presence at the scene of a crime, even when coupled with knowledge that at that moment a crime is being committed, is insufficient to prove aiding and abetting...." United States

v. Johnson, supra, 513 F.2d at 823-824. While the Government's evidence established Elmore's presence, it failed to show his purposive participation, and thus guilt on the aiding and abetting theory must fall also.

Point II

IT WAS PLAIN ERROR TO INFORM THE JURY THAT THERE WAS NO DIFFERENCE BETWEEN A FINDING OF GUILT ON THE CONSTRUCTIVE POSSESSION THEORY AND THE THEORY OF AIDER AND ABETTER.

In his main charge, the District Judge instructed the jurors that they could infer from recent unexplained possession of the checks that the possessor knew they were stolen:

> Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of the surrounding circumstances shown by evidence in the case, that the person in possession knew the property had been stolen.
>
> (544).

The Judge failed to instruct the jurors that, in the event they found that Elmore was not in actual or constructive possession, but rather had aided and abetted the unlawful possession by another, then the inference of knowledge would no longer apply and independent proof of knowledge would have to be shown.

This harmful omission from the charge was crystallized and highlighted when, after three hours of deliberation, the jury returned with the question of whether there is a difference between constructive possession and aiding and abetting. The District Court categorically informed the jury that there was no difference.* This insturction deprived appellant Elmore of a jury determination on an essential element of the charge since, while a finding of constructive possession would give rise to the inference that a defendant knew the checks were stolen, no such inference could be made on the aiding and abetting theory which would require proof of the essential element of knowledge that the checks were stolen. United States v. Jones, 308 F.2d 26 (2d Cir. en banc 1962).

It is anticipated that the Government will argue that knowledge of the stolen nature of the checks was not the disputed issue in the case and that therefore the error in the charge is harmless error since there is evidence from which the jury could infer that appellant Elmore was present at the time the checks were stolen. What this Court stated in United

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*Specifically, the Court answered: "That is a very intelligent question and the answer is that in the verdict it would make no difference which path is taken or not taken between constructive possession or aiding and abetting. It makes no difference. Do I make myself clear? It is a very intelligent question but it makes no difference which path is taken, either or both or neither" (565). Twenty minutes after receiving this instruction, the jurors returned with a verdict of guilty as to all defendants.

States v. Howard, 506 F.2d 1131(2d Cir. 1975), is particularly applicable here:

> When [the defendant] exercised his constitutional right to a jury, he put the Government to the burden of proving the elements of the crimes charged to a jury's satisfaction, not to ours or the district judge's.
>
> Id., 506 F.2d at 1134.

This case is distinguishable from United States v. Pravato, 505 F.2d 703 (2d Cir. 1974), where, having properly instructed the jury as to the elements of the crime, the Court mistakenly construed a stipulation between the parties on one of the essential but undisputed elements of the offense. Since counsel there for reasons of strategy conceded the misconstrued element during summation, the Court of Appeals found the error in Pravato harmless. Here, however, the Court did not misconstrue the evidence; rather, it failed to inform the jury that independent proof of knowledge of the stolen character of the checks must exist where guilt is premised on the aiding and abetting theory and that this was the critical difference between the two theories of guilt. Thus, even if this Court should find that there was "overwhelming proof" of the element of knowledge, the Court is nevertheless compelled to reverse. United States v. Howard, supra, 506 F.2d at 1134.

POINT III

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT ELMORE JOINS IN THE ARGUMENTS RAISED BY HIS CO-APPELLANTS IN THIS COURT INSOFAR AS THEY ARE APPLICABLE TO HIM AND NOT INCONSISTENT WITH THE POINTS RAISED HEREIN.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the indictment against appellant Elmore dismissed.

Respectfully submitted,

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July 23, 1975

CERTIFICATE OF SERVICE

7/23/75, 19

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

E. Thomas Boyle